

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR RESPONDENT FEDERAL POWER
COMMISSION

*United States Court of Appeals
For the
District of Columbia Circuit*

IN THE
United States Court of Appeals
For the District of Columbia Circuit

Joseph W. Stewart
CLERK

No. 14,583

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

BLUE RIDGE GAS COMPANY, *Intervenor.*

On Petition to Review an Order of the Federal
Power Commission

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Washington 25, D. C.*

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Is an exclusively local competitor of a proposed gas distribution system entitled to intervene as of right to represent the public interest in proceedings before the Federal Power Commission under Section 7 (a) of the Natural Gas Act on an application seeking to compel an interstate pipeline to supply gas to the distribution system, where (1) the proposed distribution system has been certificated by a State commission which has exclusive jurisdiction over it pursuant to Section 1 (c) of the Natural Gas Act; and (2) where the State commission has passed upon and rejected all of the objections to the proposed service raised by the local competitor both before the State commission and in its intervention petition before the Power Commission?

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On Petition to Review an Order of the Federal
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BRIEF FOR RESPONDENT FEDERAL POWER
COMMISSION

STATEMENT

This petition seeks review of an order of the Federal Power Commission denying petitioner's application to intervene in proceedings brought by a local gas distributor pursuant to Section 7 (a) of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 824, 15 U.S.C. 717f (a)) seeking to compel an interstate gas pipeline to supply the distributor with gas.

Petitioner is a trade association whose members market petroleum products in Virginia. The proceedings here in question were instituted following an application by Blue Ridge Gas Company in February 1958, seeking to compel Atlantic Seaboard Corporation (an interstate pipeline and a natural gas company within the meaning of the Natural Gas Act) to supply it with specified quantities of natural gas over an indefinite period.

Blue Ridge's application stated that it was presently engaged in the business of distributing propane air gas in Harrisonburg, Virginia, under a charter from the Commonwealth of Virginia, and that its service and rates are and will continue to be regulated by the Virginia State Corporation Commission.

Blue Ridge stated that it proposed to construct distribution facilities and necessary transmission facilities to provide natural gas service to the cities of Harrisonburg, Broadway and Timberville, all within the State of Virginia, as well as certain industrial customers within that State. Its application sought to purchase gas from Atlantic Seaboard through a connection with its 24-inch transmission line south of New Market, Virginia. The applicant also stated that it was concurrently seeking certification of its proposed local distribution service from the Virginia Commission (R. 3-18).

When the application was noticed for hearing (R. 234), Atlantic Seaboard filed an answer as required by Section 1.9 of the Commission's regulations (18 CFR 1.9) which in effect denied all of Blue Ridge's allegations, but admitted that it could supply Blue Ridge's demands, if compelled to by the Commission,

out of its available supply of gas without prejudice to existing customers (R. 218-219). Thereafter it sought leave to intervene, urging that the Commission should carefully explore the feasibility of the Blue Ridge project (R. 237-239).

The present petitioner filed its motion to intervene in April 1958, asserting that (A. 2):¹

The petroleum marketers, distributors, jobbers and retailers in Rockingham County, Virginia, represented by your Petitioner would compete directly and sharply with the sales of natural gas proposed by the Applicant in this proceeding and would be severely adversely affected thereby.

The intervention petition also attacked the proposed local service on the grounds of inadequate gas supply, economic infeasibility, and lack of local need.

Prior to Commission action on these intervention applications, the Virginia Commission in May 1958 held a hearing on Blue Ridge's certification applications at which petitioner appeared and raised the same objections as in this proceeding. Following the hearing, the State Commission on May 22, 1958, granted Blue Ridge a certificate of public convenience and necessity authorizing the proposed distribution service (R. 271-273).

The Commission, after considering Blue Ridge's answer to the intervention petitions (A. 3-6) and petitioner's reply to that answer (A. 7-9), on June 26, 1958, granted Atlantic Seaboard's petition and denied petitioner's (A. 9-11). Its order after noting that "the questions presented by the petition filed by Jobbers Association concern primarily matters pertain-

¹ References (A.) are to the appendix to petitioner's brief.

ing to the local distribution of natural gas", stated (A. 11):

We are of the opinion that the question of local public interest has been resolved by the local authorities.

We are of the further opinion that the sole remaining issues to be decided are those relating to the interstate transportation and sale of natural gas by the interstate pipeline company, Seaboard, subject to our jurisdiction, within the statutory criteria set forth in Section 7 (a) of the Natural Gas Act.

When a petition for rehearing of the order (A. 12) was denied by the Commission in July 1958 (A. 15), this petition for review and a stay of the order followed.²

SUMMARY OF ARGUMENT

A potential competitor of a local gas distribution company does not have an absolute right to intervene in Section 7 (a) proceedings brought to compel an interstate gas pipe line to serve the distributor.

² Petitioner also sought to enjoin further Commission proceeding in the District Court for the District of Columbia, and filed an appeal to this Court from an order of the District Court denying its motion for a temporary restraining order, and sought an injunction pending appeal. This Court in its ruling on August 29, 1958, dismissed both the motion for a stay and for injunction pending appeal, holding that petitioner's exclusive remedy was by way of Section 19 (b) of the Natural Gas Act, and that it had not made a showing justifying a stay of the proceedings before the Commission.

In the interim, the Power Commission hearing had been held and concluded, and, on August 20, 1958, the Commission granted Blue Ridge's application. Petitioner, following rejection of its motion for reconsideration of this order, sought review in this Court of the final order of the Commission. This proceeding (No. 14,731) has been stayed pending the outcome here.

A. A competitor has standing to be heard in agency proceedings affecting his economic interests only insofar as he represents the public interests, since he has no private legal right to be free of increased competition. Denial of a private interest to be heard therefore does not raise a justiciable case or controversy.

Not only must a competitor be economically injured to have standing, but also the Supreme Court (in holding that certain competitors have standing to be heard in F.C.C. licensing proceedings) has recognized that he must have the capacity to represent the public interest; and, further, that Congress must have contemplated that public representation would be inadequate, absent participation by the competitor.

Petitioner's attempt to intervene was properly denied because it meets only the first of these requirements.

B. 1. Petitioner cannot be heard by the Power Commission on the local issues of public need, technical and economic feasibility, and injury to competitors. Petitioner raised the same issues unsuccessfully before the State commission, which thereafter certificated Blue Ridge's distribution service. Since Section 1 (c) of the Natural Gas Act vests exclusive jurisdiction over all aspects of Blue Ridge's local service in the State, the State's certification cannot be questioned by the Commission. It follows that petitioner can have no standing to attack the State certification in Section 7 (a) proceedings. Since its intervention petition raises only local issues already disposed of by the State, it was properly barred.

2. *A fortiori*, petitioner is disabled to represent the public interest on the actual criteria considered by

the Commission in a Section 7 (a) proceeding. It has met none of the requirements imposed by *L. Singer & Sons v. Union Pacific R.R.*, 311 U.S. 295, and related cases, to establish eligibility as a private attorney general, since (1) it competes only indirectly with Atlantic Seaboard; (2) other fully adequate public representatives invariably participate in Section 7 (a) proceedings; and (3) a local competitor, in comparison with other interested parties and interveners, is ill equipped to represent the public interest on the real Section 7 (a) criteria, including the competing needs for gas in an entire pipe line system.

3. There is nothing in this Court's prior decisions which conflicts with the Commission's position and order. The cases relied upon by petitioner dealt with the rights of persons which competed directly with the proposed service; in each case no other agency had jurisdiction over the issues which the competitors sought to raise. It was clear also in those cases, unlike the present proceeding, that the public interest would have been inadequately represented without competitor participation.

Hence, under the rule of *Singer & Sons* and related cases, petitioner and its members have no standing to be heard as of right.

ARGUMENT

A. A COMPETITOR HAS STANDING IN PROCEEDINGS UNDER THE NATURAL GAS ACT, IF AT ALL, ONLY AS A REPRESENTATIVE OF THE PUBLIC INTEREST.

The Supreme Court, in decisions in which it has recognized that a competitor may have standing as an "aggrieved person" under statutes providing for review of agency orders, has made it clear that the standing is confined to representation of the public interest.

Thus, in *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470, the Supreme Court declared that a competitor of a radio broadcaster was a "person aggrieved" by any order issued in F.C.C. licensing proceedings, inasmuch as "one likely to be financially injured by the issuance of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission * * *". And in *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, the Court, in amplifying the *Sanders* holding (316 U.S. at 14-15), stated that competitors "have standing only as representatives of the public interest * * * the rights to be vindicated are those of the public and not of the private litigants".³ See *Associated Industries v. Ickes*, 134 F. 2d 694 (CA 2).

Since a competitor has no right to be free of otherwise lawful competition, it suffers no legal wrong by the licensing or certification of a competing business or service following enactment of a regulatory statute. Hence, as the Supreme Court has held, and as this Court recognized in its prior ruling, (Slip Op., p. 5), a competitor can participate in and seek review of agency proceedings, if at all, only as a representative of the public interest. This follows from the fact that its private interest in avoiding the economic impact of additional competition does not generate an enforceable private right to intervene and be heard, giving rise to a justiciable controversy in the Federal Courts.

Denial of competitor intervention, therefore, does

³ These cases are also discussed *infra*, pp. 19-27, in their specific application to this proceeding.

not amount to a violation of any private legal right personal to the intervenor. *Scripps-Howard*, supra, 316 U.S. at 15. The competitor has a right to intervene only to the extent that it represents the public interest in the proceeding. Where this is not the case, a competitor has no enforceable right to be heard, because denial of its application does not violate its legally protected interests, producing a case or controversy susceptible of determination in a United States court. Hence, where a competitor cannot represent the public interest, it is not entitled to be heard even though it may be injured as a result of the order or proceeding in question. *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118; *L. Singer & Sons v. Union Pacific R.R. Co.*, 311 U.S. 295.

Thus, in the *Singer & Sons* case, decided subsequent to *F.C.C. v. Sanders Brothers Broadcasting*, supra, certain commission merchants doing business in an established market sought to prevent the I.C.C. from authorizing a railroad to extend its services to a rival and competitive market on the grounds that the additional market facilities were unnecessary and injurious to the public interest, and would destroy their business. It should be noted that the commission merchants were seeking to block potential competition by preventing the railroad from serving their potential competitors. Their position thus exactly parallels petitioner here, which attempts to forestall prospective competition by preventing Atlantic Seaboard, the pipe line carrier, from serving Blue Ridge, its potential competitor. See, *infra*, pp. 21-22.

The Supreme Court held that the commission merchants were not "parties in interest" (i.e., aggrieved

parties; see *infra*, p. 30) with standing to maintain an injunction suit under Section 402 of the Transportation Act of 1920, despite their strong showing of competitive injury. The gravamen of the holding is that the commission-merchant competitors could not represent the public interest in the outcome of the I.C.C. proceedings because of the nature of the proceedings and the availability of other more appropriate public representatives, both of which factors are present in this case, as we shall show, *infra*, pp. 19-27. As the Court states (311 U.S. at 307-308):

* * * But to allow any private interest to thrash out the complicated questions that arise out of § 1 (18-22)—as, for instance, whether a proposed construction is an “extension” or a “spur”, compare *Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266—is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes.

It is therefore clear that not every competitor suffering economic injury has standing as a “private attorney general” to represent the public interest in administrative proceedings. The competitor’s private

interest, as well as the nature of the proceeding, must be considered in order to determine its standing to intervene or to appeal from agency action.

Justice Rutledge speaking for this Court in *F.C.C. v. National Broadcasting Company*, 76 App. D.C. 238, 249, 132 F. 2d 545, 556, aff'd., 319 U.S. 239, recognized that the capacity to represent the public interest is not an automatic attribute of every competitor, pointing out that such a capacity could be one of "the conditions necessary for appeal, as stated in the *Sanders* case".

Hence, as the *Singer* case demonstrates, a proceeding must not only raise a real possibility of substantial economic loss or other genuine injury to the competitor, but Congress must also have contemplated that the public interest could not be adequately represented, absent competitor participation. *Sanders* and *Scripps-Howard* rely expressly on such a Congressional intent in order to justify competitor intervention against Constitutional attacks grounded on the absence of a case or controversy. In the clear absence of such an intent, therefore, it would appear that a competitor has no right to intervene as an "aggrieved person", apart from legal injury. See *infra*, pp. 19-25.

It follows that the Supreme Court's decisions establish three prerequisites for competitor intervention in an agency proceeding:

- (1) that the intervener have a substantial economic interest in the outcome of the proceeding;
- (2) that the intervener be able to represent the public interest; and

(3) that the statute in question contemplate competitor intervention because, otherwise, the public interest would be inadequately represented.

As we shall see, *infra*, only the first of these three requirements is met in this case.

B. PETITIONER COULD NOT REPRESENT THE PUBLIC INTEREST IN THIS PROCEEDING.

Although the allegations of petitioner's intervention petition arguably raise a *prima facie* possibility of economic loss, petitioner meets none of the other requirements for representing the public interest.

Not only is the Commission debarred from considering petitioner's contentions by Section 1(c) of the Natural Gas Act (15 U.S.C. 717(c)), but petitioner itself is functionally incapable of representing the public interests on the issues considered in a Section 7 (a) hearing. Hence, denial of its intervention application does not present a justiciable case or controversy.

1. Section 1 (c) Debars the Commission From Considering Petitioner's Objections to a Competitive Service Regulated by a State Commission

Subsection (c) of Section 1 of the Natural Gas Act (15 U.S.C. 717(c)) was added to the Act by Congress in 1954 following the Supreme Court's decision in *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464, which had held that the Commission had jurisdiction under the Gas Act over a gas distributor which transported gas in high pressure lines entirely within the boundaries of one state for sale to customers within that state. Section 1 (c) was intended to do more, however, than to reverse the effect of the *East Ohio* decision. It contains a broad statement of Congressional policy limit-

ing Federal regulation of local gas services, a policy which necessarily modifies every other part of the Natural Gas Act.

Section 1 (c) provides *in toto*:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

It will be seen that the subsection exempts the entire operations of Blue Ridge from the "provisions of the Act", i.e., all the provisions of the Act that might otherwise be applicable to any natural gas company. The provision goes on to state broadly that "The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several states." If this sentence was intended to do no

more than confirm the exemption from the Federal Act stated elsewhere in the subsection, it would be entirely superfluous. Actually, it does much more than that, since it was intended to modify, and plainly does modify, the statement of policy in Section 1(a) (the preamble to the Act, 15 U.S.C. 717(a)) that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Section 1 (c) says in effect that Federal regulation of the transportation of natural gas in interstate commerce here involved is not "necessary in the public interest" when, as here, the State in question is regulating the transportation. The Section 1 (c) amendment represents therefore a fundamental departure from the prior policy of Congress, at least as interpreted by the Commission and the Supreme Court, insofar as it provides that the States and not the Federal Government will regulate gas services of the type proposed here by Blue Ridge.

The Supreme Court has given full deference and scope to such an exemption from Federal regulation in favor of the States, where Congress has declared "expressly and affirmatively that continued State regulation [and taxation] of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects". *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430, 434, 439.⁴ Where Con-

⁴ This decision refused to give a restrictive interpretation to the "McCarran Act", which validated under the Commerce Clause non-uniform State taxes on interstate insurance businesses. The Court deferred to the Congressional policy of exemption despite its express recognition of the overriding Federal interest in the regulation of commerce, including the business in question.

gress has required, as in this case, that Federal and State regulation of commerce should work in conjunction in two defined areas without duplication, this relinquishment of regulatory power to the States must be construed so as (*id.* at p. 439) "to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which to some extent at least, neither [the Federal Government nor the States] could accomplish in isolated exertion."

a. The main purpose behind the enactment of Section 1 (c), as its legislative history reveals,⁵ was to eliminate duplicating State and Federal regulation of services of the type to be supplied by Blue Ridge, and to vest jurisdiction to regulate all aspects of these services *exclusively* in the States. Duplicate regulation was regarded as unnecessary and undesirable. State licensing and rate making were preferred over Federal regulation because of the primarily local character of such services. Only the State regulatory body was to be concerned henceforth with the public convenience and necessity in the areas of local commerce exempted from Federal regulation. Such issues as the public need for the local service when measured against other existing services, the possible injury to existing competitive suppliers, and the technical and economic feasibility of the service, henceforth were exclusively for the local regulatory body. Such matters were to be considered by the Power Commission, if at all, only insofar as they directly affected an inter-

⁵ See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 5976 (the Hinshaw Bill), 83rd Cong., 1st Sess., June 29, 1953, pp. 67-68; H. Rep. 899, 83rd Cong., 1st Sess., pp. 1-2; S. Rep. 821, 83rd Cong., 1st Sess., pp. 1-2.

state gas supply services subject to Commission regulation.

Section 1 (c), as we have said, represents more than a narrow Congressional prescription. It embodies a basic shift in regulatory policy⁶ that reflects a legislative "mood" which is broader and more pervasive than a Congressional edict—one to which the Commission and the courts must give deference. Cf. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487. Section 1 (c) provides that the "matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern". The legislative history of Section 1 (c), shows that that provision resulted largely from the conviction of its proponents that the Federal Government should not be allowed to interfere with State regulation of local gas services.

Since (340 U.S. at 489) "a fair interpretation of a statute is often 'the art of proliferating a purpose', *Brooklyn National Corp. v. Commissioner*, 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing", Section 1 (c) should be construed to give full effect to the sense of Congress that the States must be left free to regulate gas transportation entirely within their borders. Petitioner's attempt to reargue the State certification proceeding before the Power Commission, however, is a basic attack on this Congressional policy.

The Virginia State Commission had determined prior to the Power Commission action here under at-

⁶ Although the committee reports on H.R. 5976 (*supra.*, p. 14) speak of Section 1 (c) as clarifying the original intent of the Natural Gas Act, both the Supreme Court and the Commission had concluded that the Act, prior to the amendment, was intended to apply to local services of the type here involved.

tack that the proposed Blue Ridge service was required by the public convenience and necessity. Petitioner participated in the State proceeding, raising the very objections which it sought to raise before the Commission. Those objections were rejected by the State Commission. Under the division of regulatory responsibility contemplated by Section 1 of the Natural Gas Act, the State's determinations are not re-examined by the Commission. Petitioner's grievance against the entry of local competition undoubtedly gave it standing to resist State certification of the Blue Ridge service. Having failed before the State Commission, it now seeks a second opportunity to present the same arguments in another forum. But under Section 1 (c), the Commission cannot reappraise the State Commission's action. It cannot even consider the objections and attacks which petitioner has directed against the State's certification, for otherwise it would be trespassing in the State's regulatory field. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430, 434, 439. For the Commission to accord petitioner standing to attack the State's certificate, would fly directly in the face of Section 1 (c)'s prohibition against regulation of the local service. Since standards to be applied in approving that service are not the business of the Commission, petitioner has no standing to attack those standards before the Commission.

It must be remembered that petitioner can be heard by the Power Commission, if at all, only as a representative of the "public interest". However, the "public interest" in the local gas service, including its impact on competitors, has already been determined by the State of Virginia. It is not possible, there-

fore, for petitioner to represent the public on the issues which it attempts to raise before the Power Commission.

Petitioner emphasizes the fact that the Commission looked into the feasibility and need for the Blue Ridge project, arguing (Br. 9-10) that this gave it standing to re-advance the arguments which it had presented unsuccessfully to the State. But, as stated *supra*, pp. 15-16, the Commission looks at such matters only insofar as they impinge on the interstate pipe line service which it regulates; it does not pass upon the validity of the State's certification. Thus, the Commission explored the economic feasibility of the Blue Ridge Service solely from the standpoint of protecting Atlantic Seaboard's investment in providing the service, in order to make the required Section 7(a) finding that "no undue burden will be placed upon" it by the compelled service. The Commission's limited consideration of this issue, as we show *infra*, pp. 19-27, no more gives petitioner or any other competitor of Blue Ridge standing as a public representative than the quite different consideration of the same factual issue by the State Commission would give standing to a competitor of Atlantic Seaboard.^{6a}

The Commission's consideration of economic feasibility of the service under Section 7 (a) does not duplicate or conflict in any significant way with the State's jurisdiction over the local need for and feasibility of the service. The State Commission assumes the avail-

^{6a} Atlantic Seaboard, as we show, *infra*, pp. 24-27, is the one completely adequate representative of the public interest on issues affecting its own financial stability, just as petitioner in State proceedings may appropriately represent the public interest on the local need for gas, or competitive injury.

ability of the gas and considers the best interests of its citizens. The Power Commission determines the availability of the gas after considering the general public interest in the interstate gas transportation, including the economic stability of the buyer. It follows that to accord petitioner standing as a representative of the public interest in both State and Federal proceedings, which deal with different aspects of the local service and apply different standards, would conflict with Section 1 (c) which contemplates a sharp division of regulatory responsibility. For only if the Commission were empowered to overturn the State certification—rather than merely to withhold the interstate gas—would petitioner have standing to attack the State certification. In addition, as we show in the succeeding section, petitioner (as a local, potential competitor of a customer) has no standing to be heard on the issues actually disposed of in a Section 7 (a) proceeding.

b. To accord petitioner recognition as a proponent of the public interest in the local gas service would also be in square contradiction to the expressed Congressional intent embodied in Section 1 (c) that there should be no duplication of Federal and State regulation. To hear petitioner twice on the same objections, once before the State Commission and once before the F.P.C. would clearly amount to a duplication of regulation with increased expense to all concerned. This would produce all of the evils associated with regulatory conflicts. Avoidance of duplication and added expense was the expressed objective of Section 1 (c).

It follows that petitioner was not entitled to be heard as of right in the Section 7 (a) proceedings.

2. Petitioner Cannot Represent the Public Interest on Questions Properly at Issue in a Section 7 (a) Proceeding

Even if petitioner has no standing to attack the State's certification, and in so doing to represent the public interest on the local issues of need for and feasibility of the proposed service, petitioner argues (Br. 7) that it does have standing to represent the public interest on the matters properly before the Commission under Section 7 (a), in determining whether the connection sought with the interstate pipe line is "necessary or desirable in the public interest", including the issue of the impact of the proposed service on the pipe line company's economic stability. It is clear *a fortiori* however that petitioner can have no such standing.

We have seen that under the Supreme Court's decisions in *Sanders Brothers* (309 U.S. 470), *Scripps-Howard* (316 U.S. 4), and *Singer & Sons* (311 U.S. 295), a competitor's standing as a "King's proctor" or "private attorney general" depends on whether representation of the public interest would be adequate, absent its intervention in the proceeding. In the *Sanders* and *Scripps-Howard* cases (*supra*, p. 7) the Court held that a competing broadcaster was a proper and necessary representative of the public interest in F.C.C. licensing proceedings because it competed directly with the applicant and since otherwise there might be no one with a sufficient interest to protest the applications. The right to hearing given the competitor in F.C.C. licensing proceedings despite its lack of legal injury was expressly grounded on these reasons. A contrary result was reached in *Singer & Sons* (a holding subsequent to *Sanders Brothers*) applying the same test.

a. The present case is a close equivalent of *Singer & Sons* but is radically different from *Sanders Brothers* or *Scripps-Howard*. In the first place, as we have been at pains to emphasize, the Commission in these proceedings is not licensing a local gas service. A Section 7 (a) application *presumes* either present or future State certification since it would be fruitless for the Commission to compel a connection absent State authorization. Petitioner, as we have pointed out, *supra*, p. 8, is a potential competitor, not of the interstate pipe line in supplying gas to a local service, but of the local service itself. It is true that petitioner's "members comprise both marketers and distributors" (Slip op. p. 8-9; Br. 5, 6), but it is not true that Atlantic Seaboard competes with any of petitioner's members, either at wholesale or retail, except insofar as it can be said to compete indirectly through Blue Ridge's local sales. In particular, Atlantic Seaboard does not propose to make direct sales to any gas consumer which might be served by any of petitioner's members. Hence, the only threat of competition raised by the proposed service is competition entirely at the retail or local level. Any impact in petitioner's members as a result of this proceeding would result from sales made by Blue Ridge, sales which are exclusively State-regulated.

Petitioner's intervention application (A. 2) and brief (pp. 5, 6) in fact do not allege that its members compete with Atlantic Seaboard itself but only with the distribution of the gas wholesaled by it, being careful to claim at most only that "petitioner's members compete directly with both Atlantic Seaboard *as a wholesaler of natural gas to Blue Ridge* and with Blue Ridge" (emphasis supplied).

Hence, this Court was under a basic misapprehension when it stated in its prior ruling (pp. 8-9) that

[F]rom the record before us we see that petitioner alleges it competes with *Atlantic*—the interstate pipeline—that is undoubtedly under the Commission's, and not the state's, aegis. So considered, petitioner's role before the Commission in developing the national public interest aspects of the introduction of interstate natural gas to a new market seems clear. We conclude petitioner has shown a probability of success on the merits of its appeal.

It is evident, therefore, that the Court's tentative conclusion that petitioner had standing to represent the public on "the national public interest aspects of the introduction of interstate natural gas to a new market" is ill-founded. Petitioner's competitor status before the Power Commission is not equivalent to that of the competing broadcasters in *Sanders Brothers* or *Scripps-Howard*.

While petitioner's relation to Blue Ridge in the *State proceeding* might be considered comparable to that of the broadcaster competitor before the F.C.C., this analogy plainly breaks down in *Section 7 (a) proceedings* in which issues of financial stability are merely ancillary to the controlling standards imposed by the Gas Act, and where the true competitive interests are other communities or distributors seeking gas from the pipe line, not competitors of local distribution services. See *infra* pp. 24-27. On the contrary, as we have already stressed, petitioner stands in relation to the proposed service of Atlantic Seaboard in exactly the same posture as the commission merchants in the

Singer & Sons case stood in relation to the rail service which they there sought to block.

Like those petitioners, in the words of the Supreme Court, the present petitioner's "welfare" (311 U.S. at 304), "could only be indirectly and consequentially affected by the proposed extension" of service which they seek to resist. Here, as there (311 U.S. at 303), there is no "probability of direct loss from what the defendant—not another—proposed to do". In other words, neither the commission merchants nor the present petitioners—because of their only indirect interest and remoteness from the issue—can claim to represent the public interest in these proceedings. Hence, the rule of the *Singer & Sons* case, which is clearly controlling here, demonstrates that petitioner has no absolute right to be heard.

Petitioner's attempt to prevent Blue Ridge (and indirectly its present and potential customers) from using Atlantic Seaboard's gas is closely analogous to the Sugar Refiners Association's attempt to prevent food processors from using the products of its competitors in *United States Cane Sugar Refiners' Ass'n. v. McNutt*, 138 F. 2d 116 (CA 2). The question in that case was whether the Association was a person "adversely affected" within the meaning of Section 701 of the Food, Drug and Cosmetic Act of 1938 (21 U.S.C. 301-392) by an order issued pursuant to that statute. The Association alleged that the order made it commercially feasible for food processors to substitute other cheaper sweetening agents in place of sugar and thus would cause its members economic loss. Similarly here, petitioner argues that the Commission's order directing Atlantic Seaboard to serve Blue Ridge will allow that company and its customers to use nat-

ural gas in place of petroleum products. In both cases, the complaining party is several steps removed from the impact of the Commission's order.

The Second Circuit held that in these circumstances the Sugar Association lacked standing under the rule spelled out by that court in the earlier *Associated Industries* case because its competitive relationship with the suppliers of competing sweeteners was not "of sufficient immediacy and reality" (138 F. 2d at 120), and its interest in the order was therefore too remote and speculative. Where this is the case, "public interest" may require, not that a competitor be permitted to intervene, but rather that it be denied a hearing in order "to effectuate the public interest the statute was designed to promote".

As the Second Circuit stated (138 F. 2d at 120):

* * * increased competition may be enough, though the policy behind the statute is to maintain competitive practices that are in the public interest, to show that a person has been "adversely affected" by an administrative order. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869, 1037. Yet giving effect to such considerations by no means requires their extension to include all persons whose desire to review such regulations as these happens to be created by the mere possibility of having to meet competition in business they would rather have eliminated. The paramount need for the orderly and the reasonably expeditious administration of the statute by the official charged with the duty of making it effective in the public interest creates at least the need of limitations upon the construction of the term "adversely affected" to do away with delays that otherwise could be brought about by persons

upon whom the adverse effect of the regulations would at most be so negligible that it should be disregarded to effectuate the public interest the statute was designed to promote.

b. In addition, *Sanders Brothers*, *Scripps-Howard* and *Singer & Sons* all recognize that the adequacy of other representation is a decisive factor in determining who can claim to represent the public interest in any proceeding. The first two decisions concluded that representation would be inadequate without participation by the then petitioners. *Singer & Sons* denied standing expressly on the ground that representation by public bodies would be adequate in the scheme of regulation adopted by the Transportation Act (311 U.S. at 305-308).

This latter conclusion applies with equal if not greater force to the present proceeding. Section 7 (a) proceedings, unlike broadcasting hearings, by their very nature are adversary proceedings. Only if the pipeline must be *compelled* to supply is there any resort to the proceeding in the first place. The pipeline in such hearings is, therefore, invariably an adversary party seeking to avoid or modify the proposed connection and service, and prepared to raise (as here) all of the issues bearing on whether the proposal is "necessary or desirable in the public interest", including the most prominent issue in this proceeding, the economic feasibility of the service. On this issue the pipeline's interest that its bills for gas be paid makes it the private party most likely to scrutinize thoroughly the economic feasibility of the proposed customer project. Moreover, as we have pointed out, the Commission's experience shows that usually other legitimate interveners, such as direct com-

petitors for the available gas and competing pipe lines, appear and challenge applications in Section 7 (a) proceedings. See e.g., *Manufacturers Light & Heat Co. v. F.P.C.*, 206 F. 2d 404 (CA 3).

There is no justification or need therefore in such a proceeding to look to a local competitor at a subsequent level to represent the public interest on the question of whether the pipe line should be required to make the connection. As the Court recognized in its prior ruling (p. 7), "The interests of private litigants must give way to the realization of public purposes." To allow such competitors to intervene merely because they may have a financial stake in the outcome of the proceeding, is, as the Supreme Court recognized in *Singer & Sons* (311 U.S. at 307) "to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues".

It follows that petitioner meets neither of the two tests imposed by the Supreme Court.

c. There is a further reason for denying petitioner standing as an aggrieved party. Section 7 (a) proceedings assess the public interest in compelling an interstate pipe line to serve a particular distributor, usually in the face of conflicting demands for its available capacity by other purchasers. The Commission must weigh the claims of the particular buyer against other needs in the pipe line's over-all system, and in the region in question which may be larger than the system. In so doing, the Commission must accept the State's certification of the local need for the service, and must weigh this certification against other needs and proposed services elsewhere.

As we have pointed out already, the economic feasibility of the proposed distribution service is explored by the Commission in a 7 (a) proceeding only insofar as it may have some bearing on the pipe line's own financial position. Section 7 (a) thus is primarily concerned with allocation of an interstate service among various users, rather than local licensing. See *Manufacturers Light & Heat Co. v. F.P.C.*, 206 F. 2d 404, 408 (CA 3).

The local competitor of a proposed distribution service is usually ill-informed about and uninterested in the system-wide issues dealt with in a Section 7 (a) proceeding, and therefore unable to represent the public interest on them. Having shot its bolt in the State proceeding on the local issues of need, competitive injury, and feasibility (as to which presumably it is informed), it is in no position to help the Commission assess the conflicting needs for gas in a subsequent Section 7 (a) proceeding. Experience in fact has shown that in Section 7 (a) proceedings, such competitors seek (as does petitioner) merely to reargue the local issues resolved against them by the State.

The logical and the only effective public representatives in Section 7 (a) proceedings are, first, the pipe line itself, which is resisting the service, and second, other gas buyers in the area. These parties, given the fierce competition for natural gas service, can be relied upon to challenge the proposed service connection, and to represent all phases of the public interest. Such parties have a much more immediate self-interest and familiarity with the questions than a local competitor—not of the pipe line—but of its customers.

Moreover, State Commissions and municipalities almost invariably intervene in Section 7 (a) proceedings

to represent directly and immediately the "public interest". As *Singer & Sons* recognizes (311 U.S. at 306), where this is the case, "To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress."

Hence, the local competitor's standing as a "private attorney general" stops at the termination of the State certification, and does not extend to the very different issues considered in a 7 (a) proceeding.

3. This Court's Decisions Are Not to the Contrary

There is nothing in this Court's decision in *National Coal Ass'n. v. F.P.C.*, 89 App. D.C. 135, 191 F. 2d 462, and *City of Pittsburgh v. F.P.C.*, 99 App. D.C. 113, 237 F. 2d 741, which is contrary to our position.

National Coal involved an attempt by a coal operators' trade association and allied interests to intervene in Section 7 (e) proceedings brought by a pipe line seeking authorization to construct facilities in order to supply gas to the Atomic Energy Commission plant at Oak Ridge, Tennessee. The coal operators represented by the Association, unlike the present petitioner's members, were direct competitors of the pipe line because they sold directly to the AEC plant.⁷ Since the pipe line was not resisting the certification, but seeking it, there could be no assurance that its application would be contested unless the coal operators were treated as "aggrieved parties". Further, the sale to the AEC was not regulated by any State agency.

⁷ The present situation would be analogous to *National Coal* if petitioner's members sold directly to Blue Ridge, which they of course do not.

This Court held that the Coal Association, which had been a party intervener before the Commission, was an aggrieved party which could obtain review of the Commission's order under Section 19 (b) (15 U.S.C. 717r (c)).⁸ The Court expressly declined to consider what would be the result in (89 App. D.C. at 139-140, 191 F. 2d at 467) "a case in which [petitioners] were not permitted to intervene" such as the present case.

National Coal recognized (89 App. D.C. at 138, 191 F. 2d 462, 465) that Congress was concerned in the 1942 amendment to Section 7 (c) of the Gas Act with the impact of interstate gas pipe line extensions on competing fuel interests; and fuel interests are usually represented in Commission hearings on such extensions. This does not mean, however, that local competitors, which have an adequate remedy before a State commission, have an automatic right to be heard in Section 7 proceedings which involve their interests only indirectly. As originally introduced, the bill that amended Section 7 (c) in 1942 contained a subsection (h) providing a generalized disclaimer of Federal jurisdiction, the effect of which would have been to exempt services such as Blue Ridge's from Commission regulation. The House Committee Report relied on in *National Coal*, *supra*, in commenting on the elimination of this subsection, stated (H. Rep. 1290, 77th Cong., 1st Sess., p. 5):

"It is believed that the bill, with the committee amendment striking out subsection (h), provides adequate legislation for the present on the subject

⁸ Employees of the competing companies were also held to be aggrieved because their economic interest was linked directly to that of the company.

of certificates of public convenience and necessity. The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection."

The "more detailed and comprehensive plan" for delineating State and Federal jurisdiction is of course contained in Section 1 (c).

It must be evident, therefore, that the *Coal Association* decision with its basic factual and procedural differences, is not controlling here.

City of Pittsburgh is also wholly inapposite. That case involved *inter alia* an application under Section 7 (b) of the Act to abandon certain interstate gas pipe line facilities (the "Little Inch") as a first step towards employing these facilities to transport fuel oil. This service allegedly would compete directly with that of certain barge operators, which were permitted to intervene, and thereafter sought review of the Commission's order allowing abandonment. This Court held that the barge operators were aggrieved and could seek review.⁹ As the Court recognized (99 App. D.C. at 127, 237 F. 2d at 755), no other agency could prevent institution of the competing oil pipe line serv-

⁹ The City of Pittsburgh was also found to be aggrieved because the need to construct additional facilities to replace the "Little Inch" might result in increased cost of gas to its consumer residents.

ice so that the barge competitors could obtain a hearing, if at all, only before the Power Commission. It also seems self-evident that the barge operators were the only competitors who had an economic interest in challenging the abandonment order, inasmuch as other natural gas companies would not be likely to protest a decline in competition. These factors sufficiently distinguish *City of Pittsburgh* from the present case and bring it within the principles stated in *National Coal, supra*.

City of Pittsburgh distinguishes *Singer & Sons* on several grounds (99 App. D.C. at 119-120, 237 at 747-748), none of which in any way detract from its controlling effect here.

The primary distinction there relied upon by the Court (that the Transportation Act involved in *Singer & Sons*, unlike the Gas Act, allows suits by both State agencies and "any party in interest"; 99 App. D.C. at 119-120, 237 F. 2d at 747-748) appears based on a misapprehension. Since Section 19 of the Gas Act expressly refers to State agencies as parties who may be "aggrieved", the two statutes are parallel in this respect. It has been widely recognized (see, e.g., *Associated Industries v. Ickes*, 134 F. 2d 694 (CA2)), that no real distinction can be based on the variations in the terminology used in describing aggrieved parties in review provisions, such as "party in interest" and "party aggrieved"; yet this is the only significant difference between the review provisions of the two statutes. Hence the *Singer & Sons* decision is not distinguishable on this ground.

The second distinction (99 App. D.C. at 120, 237 F. 2d at 748)—that the petitioner both in that case and in

Sanders Brothers had been a party to the proceeding below—obviously has no applicability here.

The remaining ground for distinguishing *Singer & Sons* was that the barge operators' injury might be sufficient to give them standing under Section 19, but not in an injunction action pursuant to Section 402 (20) of the Transportation Act (49 U.S.C. 1 (20)).

We have seen that the barge operators, unlike the present petitioner, were capable of representing the public interest under the *Sanders Brothers* and *Scripps-Howard* cases; and this is in itself a sufficient distinction between *City of Pittsburgh* and *Singer & Sons*, without reliance on the nature of the review proceedings. By the same token, the latter decision is directly applicable here since we have seen that under the test of all these cases the present petitioners have no standing as public representatives. Like the competitors in *Singer & Sons*, they have only an indirect and local interest in the pipe line's service and there are other competitors and public agencies more immediately affected which can be relied upon to protect the public interest.

Additionally, the language of Section 19 of the Gas Act as we have noted, is substantially equivalent to Section 1(20). Section 19, if anything provides a more restrictive standard for review. Finally, the holding in *Singer & Sons* is based on principles generally applicable to any review proceeding and rests in no way on the special character of an injunction proceeding.¹⁰

¹⁰ *Philco Corp. v. F.C.C.*, ... AppDC, 257 F.2d 656 (pending on petition for certiorari, No. 371, Sup. Ct.), relied upon by petitioner (Br. 7), involved an F.C.C. licensing proceeding, as did the Supreme Court's decision in *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470. A competitor of the licensee's owner sought

CONCLUSION

We believe that *L. Singer & Sons v. Union Pacific R.R.* is dispositive here. That decision contains a square holding unquestioned and unmodified by any later decision, which cannot be brushed aside or ignored by petitioner. *Singer & Sons* is far closer in its facts and rationale to the present case than any decision relied on by petitioner, or cited by this Court in ruling on the earlier motions. We submit that it completely supports the position taken here by the Commission.

For this and the other reasons set forth above, it is respectfully submitted that the Commission's order should be affirmed.

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to intervene in the proceeding alleging that the licensee had used its broadcasting facilities to obtain an unfair and illegal competitive advantage over the competitor-intervener in the sale of electronic equipment. In a carefully limited holding, this Court following *Sanders Brothers* held that the competing manufacturer had standing to intervene in the proceedings to raise the anti-trust objections. The Court emphasized that the intervener was a direct competitor of the licensee's owner and that its standing was limited to protesting the alleged unfair trade practice. It seems obvious that had the competitor in *Philco* not been able to intervene, there would have been no one to represent the public interest on this question. This holding is merely an application of the *Sanders Brothers* doctrine, which is completely consistent with our position here.

